2005

Edward B. Rogers v. West Valley City : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

EDWARD B. ROGERS, Appellant/Plaintiff, vs. WEST VALLEY CITY, Defendant/Appellee,	BRIEF OF APPELLANT APPEAL Appellate Case No. 20050111 Trial Court No. 040916458 Trial Court Judge J. Dennis Frederick From a Petition for Review of the West Valley City Board of Adjustment Matter B-9-2004

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JURISDICTION STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(j).

ISSUES PRESENTED

1. Must intent to abandon be considered in determining whether a nonconforming use has been lost where West Valley City Municipal Code §7-18-106(3) requires, "If the nonconforming use is discontinued for a continuous period of more than one year it shall constitute an abandonment of the use and any future use of such land shall conform to the provisions of the zone in which it is located," and where Utah Code Annotated §10-9-103(1)(l) defines a nonconforming use of land as a use that "has been maintained continuously since the time the zoning regulation governing the land changed?"

Standard of review: Review is for correctness. Interpretation of the meaning of zoning ordinances by a board of adjustment is not entitled to deference. Patterson v. Utah County Bd. of Adjustment, 893 P.2d 602, 604 (Utah App. 1995); Brown v. Sandy City Bd. of Adjustment, 957 P.2d 207, FN 5 (Utah App. 1998).

Citation to the record: This issue was discussed by the board at its meeting. (R. 59, 60, 79-89).

2. Did Cleone Kirby intend to continue the nonconforming use of allowing horses on her property where horses belonging to someone else were removed from her property only because a neighbor removed his fence, where the property was vacant for two years, and where another person built a fence and placed her horse on the property after those two years?

Standard of review: When a district court's review of an administrative decision is challenged on appeal and the district court's review was limited to the record before the board, the appellate court reviews the administrative decision just as if the appeal had come directly from the agency. Caster v. West Valley City, 2001 UT App 212, ¶4, 29 P.3d 22, 23 (Utah App. 2001). The decision of the board must be affirmed if the board's decision is supported by substantial evidence in the record. Utah Code Ann. § 10-9-708(6). "Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." Caster, 2001 UT App 212, ¶4, 29 P.3d 22, 23.

Citation to the record: This issue was discussed by the board at its meeting. (R. 59, 60, 79-89).

DETERMINATIVE STATUTORY PROVISIONS

West Valley City Municipal Code §7-18-106(3)

"Nonconforming Use of Land. A nonconforming use of land lawfully existing on the effective date of this Chapter may be continued provided such nonconforming use shall not be expanded or extended into any other open land, except as otherwise provided in this Chapter. If the nonconforming use is discontinued for a continuous period of more than one year it shall constitute an abandonment of the use and any future use of such land shall conform to the provisions of the zone in which it is located."

Utah Code Annotated §10-9-103(1)(l)

"'Nonconforming use' means a use of land that: (i) legally existed before its current zoning designation; (ii) has been maintained continuously since the time the zoning regulation governing the land changed; and (iii) because of subsequent zoning changes, does not conform with the zoning regulations that now govern the land."

STATEMENT OF THE CASE

1. Nature of the case: This is a review of a board of adjustment decision to allow a nonconforming use.

2. Course of proceedings: On June 21, 2004 Alfred Newman, trustee of the Elvis Kirby Estate, filed a Non-conforming Use Application To The Board Of Adjustment. (R. 25). The West Valley City Board of Adjustment held a meeting to consider the application (B-9-2004) on July 7, 2004. (R. 58). The board voted 4 to 1 in favor of the following motion: "that in the matter of B-9-2004, that we approve the non-conforming use on this property as animals were historically on the property and I believe the property owners did not intend to abandon that use for the keeping of animals." (R. 88-89). A neighboring landowner, Edward Rogers, filed a Petition for Review with the Third District Court on August 5, 2004. (R. 1). Without any addition to the record from the Board of Adjustment, the District Court affirmed the board's decision on January 7, 2005. (R. 143). This appeal was filed with the Utah Supreme Court on February 3, 2005. (R. 145). The Utah Supreme Court transferred this case to the Utah Court of Appeals. (R. 147).

3. Statement of facts:

Cleone Kirby owns a life estate (the remainder owners are never mentioned) on a parcel of land at 3724 South 3200 West in West Valley City ("The Property"). (R. 27). Livestock, including horses, was maintained on the property beginning in 1958. (R. 60). Horses were on the property through 2000 and for many months in 2001 or 2002. (R. 62, 65, 66). West Valley City incorporated in 1980 and created zoning provisions that

prohibit animals like horses in the area that includes Cleone Kirby's property, making the keeping of horses a nonconforming use. (R. 58).

Cleone Kirby had not maintained a personally owned horse on her property for the past several years, and there was no evidence that she owned a horse at any relevant time, though various other people had placed horses on her property. (R. 62, 64 – Fred Kirby, 65 –Ronald Richins, 68 –Barbara Spray, 70 –Raymond Spray). For a period of two years between 2002 and 2004 no horse resided on the Mrs. Kirby's property. (R. 66).

An apartment complex borders the Kirby Property. (R. 60, 71-76). When the apartment complex was built in 1973 or 1974, the builder built a cedar fence along the border between the complex and the Kirby Property. (R. 62, 72, 74). Fred Kirby and his brothers and/or his father had already built a fence to separate the two properties, but that fence was removed when the cedar fence was built. (R. 62—Fred Kirby, 85—Mr. Moore).

In 1977 Edward Rogers purchased the apartment complex, which included the rights to the fence. (R. 71, 84, 85). In 2000, Fred Kirby and his fiancé moved their three horses from the Property to Bountiful, Utah because they could not maintain the cedar fence (there was no evidence that anyone or anything prevented Fred Kirby from building a new fence). (R. 62, 63).

In 2001 or 2002, Ronald Richins's brother placed horses on the Kirby Property, where they stayed "for months." (R. 65). In 2002 two men named Joe and Lou approached Cleone Kirby and asked permission to drop some trees on her property to prevent the trees from falling on the apartments. (R. 77). Cleone Kirby said Joe and Lou

said Edward Rogers told them he (Edward Rogers) intended to rebuild the fence they had to take down to drop the trees. (R. 77, 87). Because the fence was removed, Ronald Richins's brother removed the horses he had placed on the property many months before (there was no evidence that anyone or anything prevented Ronald Richins's brother from building a new fence). (R. 65). "One of the reasons" Ronald Richins's brother could not return the horses to the Kirby Property is the fence was not replaced. (R. 65).

Barbara and Raymond Spray moved to Utah from Oklahoma in 2003 to be with Barbara Spray's ailing father. (R. 68, 70). In June 2004, one month before the board meeting, and after a two-year absence of horses, Ronald Richins with financial help from the Sprays built a chain-link fence to enclose Cleone Kirby's property. (R. 64, 65, 68, 70). The Sprays then placed their horse on the Property. (R. 68, 70).

Twenty three statements of "I have observed that at least one horse has been on the property a substantial portion of every year since . . ." were also given to the board. (R. 28-51). None of the statements is notarized. One appears to be a forgery (R. 48, 51). One appears to contradict the person's own live testimony to the board of a two-year absence of horses (R. 34, 65). They all contradict the landowner's admission that no horses resided on the property for a period of two years between 2002 and 2004. (R. 66).

SUMMARY OF ARGUMENTS

The West Valley City Municipal Ordinance at issue is unambiguous. A discontinuance of the nonconforming use for over one year extinguishes that use, and future use must conform to current zoning provisions. Cleone Kirby discontinued having horses on her property for a two-year period. Because the ordinance extinguishes

nonconforming uses without regard to intent to abandon the use, the West Valley City Board of Adjustment should have disregarded Cleone Kirby intent and denied her application to resume maintaining horses on her property. This reasoning is in line with a growing minority of jurisdictions, it gives full credit to the ordinance as written, and it promotes the public policy of creating uniform zoning plans and phasing out as quickly as possible nonconforming uses.

Some jurisdictions that dispense with an intent requirement still allow a nonconforming use if discontinuance occurred due to circumstances wholly beyond the control of the landowner. No such circumstances exist in this case. If they did, this Court should disregard them because the statute does not mention circumstances beyond the landowner's control and because doing so requires an examination of intent, which is irrelevant.

Considering the evidence of intent, though, the record lacks substantial evidence to support a finding of intent to rebut a presumption of intent to abandon. Cleone Kirby did not attempt to build a fence to hold horses or to obtain a horse within the two-year period of time. Her neglect, and not the actions of others, is the cause of the discontinuance of horses on the property.

This Court should accept the objective test of discontinuance for one year and disregard evidence of intent to abandon or external circumstances. Further, this Court should reverse the Board's decision to permit the nonconforming use and require the Board to retract its approval of the nonconforming use application in this matter.

ARGUMENT

The current zoning provisions for Cleone Kirby's property prohibit maintaining animals such as horses. Because horses were maintained on the Property at the time West Valley City incorporated, the maintaining of horses was a legal nonconforming use of the land pursuant to West Valley City Municipal Code §7-18-106(3) ("The Ordinance"). That same ordinance that allows the nonconforming use prohibits it if the use "is discontinued for a continuous period of more than one year." Id.

No horses resided on the Property for two years. (R. 66). Consequently the nonconforming use was lost, regardless of the landowner's intent to abandon the use. Even if intent to abandon is a necessary inquiry the record lacks substantial evidence of Cleone Kirby's intent to continue the nonconforming use. This Court must reverse the West Valley City Board of Adjustment decision to approve the nonconforming use of allowing horses on Cleone Kirby's property.

A. Cleone Kirby's intent is irrelevant

West Valley City Municipal Code §7-18-106(3) reads,

> "Nonconforming Use of Land.[1] A nonconforming use of land lawfully existing on the effective date of this Chapter may be continued provided such nonconforming use shall not be expanded or extended into any other open land, except as otherwise provided in this Chapter. If the nonconforming use is discontinued for a continuous period of more than one year it shall constitute an abandonment of the use and any future use of

[1] Utah Code Annotated §10-9-103(1)(l) defines a nonconforming use of land as a use that "(i) legally existed before its current zoning designation; (ii) has been maintained continuously since the time the zoning regulation governing the land changed; and (iii) because of subsequent zoning changes, does not conform with the zoning regulations that now govern the land."

such land shall conform to the provisions of the zone in which it is located."

The ordinance unmistakably uses the word "shall" to describe what must occur if a nonconforming use is discontinued for more than one year. It also uses "shall" to describe the relationship between a discontinuance and abandonment, leaving no doubt as to the ordinance's meaning. The discontinuance of the nonconforming use "shall constitute an abandonment of the use" and future use "shall conform to the provisions of the zone in which it is located."

It is undisputed no horses resided on Cleone Kirby's property for a continuous two-year period between 2002 and 2004. (R. 66). Based solely on that fact, the use has been abandoned, and any future use must conform to the current zoning provisions. The ordinance does not require an inquiry into the landowner's intent to abandon. On the contrary, by its strict language the ordinance forbids an inquiry into intent if the nonconforming use is discontinued for more than a year. The discontinuance "shall constitute and abandonment."

As West Valley City argued to this Court just a few years ago in Caster v. West Valley City, 2001 UT App 212, 29 P.3d 22 (Utah App. 2001), Utah case law demonstrates the validity of the West Valley City discontinuance provision.[2] As West Valley City explained, "The law in Utah is clear. State statute, Morrison, and Holt

[2] In *Caster*, the Court did not reach the question of intent as it relates to abandonment of a nonconforming use. Caster, 2001 UT App 212, 29 P.3d 22 at footnote 2. However, both parties argued the issue in their Briefs. (See Addendum). The only reason the West Valley City Board of Adjustment considered intent in the current case is because it thought this Court in *Caster* had required an inquiry into intent. (R. 59, 60, 79)

demonstrate that discontinuance ordinances are common and valid in Utah and where evidence exists confirming discontinuance for the required time period, property owners are required to comply with current zoning standards."[3] (Addendum p. 3).

The City continued, "Utah state statute requires continuous use of a nonconforming use to maintain nonconforming use status. By defining a nonconforming use as a use of land that 'has been maintained continuously since the time the zoning regulation governing the land changed,' it is clear that a nonconforming use that has not been continuously maintained must comply with current zoning regulation. Utah Code Ann. §10-9-103(1)(l)(ii)(2000)." (Addendum p. 3).

In State of Utah v. Estate of Holt, the Supreme Court of Utah held, "evidence which showed a discontinuance of the non-conforming use for a period of five years after the one-year period provided in the ordinance proved an effective abandonment of such right and the property was thereafter subject to the zoning requirements." 381 P.2d 724, 725 (Utah 1963).

Other jurisdictions agree the running of a statutory discontinuance period results in the loss of nonconforming use status. A Minnesota court explained,

> "Minn.Stat. §394.36 and section 16 of the Isanti County Zoning Ordinance clearly state that discontinuation of a non-conforming us for one year results in termination of that use. This court cannot amend these unambiguous provisions by placing upon counties the burden of having to prove that a landowner intended to abandon a discontinued nonconforming use.

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[3] Morrison v. Horne, 363 P.2d 1113 (Utah 1961); State of Utah v. Estate of Holt, 381 p.2d 724 (1963)

County of Isanti v. Peterson, 469 N.W.2d 467, 470 (Minn. App. 1991); *See also*, Auditorium, Inc. v. Board of Adjustment of Mayor, Etc., 91 A.2d 528 (Del. 1952), (holding discontinuance shall be deemed abandoned where the ordinance so states, and "the attempt of the Board of Adjustment to reserve the right to resume the prior non-conforming use . . . was contrary to the express provision of the Building Zone Ordinance and, therefore, of no effect."). The West Valley City ordinance is equally clear about the effect of discontinuance for more than one year and must be enforced as written.

The Supreme Court of Colorado reasoned that requiring intent to abandon where the ordinance eliminates a nonconforming use upon discontinuance for a certain period of time produces "unfortunate but silly" results. Hartley v. City of Colorado Springs, 764 P.2d 1216, 1223 (Colo. 1988), *quoting* 4A N. Williams & J. Taylor, American Land Planning Law §115.06, at 193 (rev. ed. 1986). It "encourages property owners who have actually abandoned their nonconforming use to commit perjury" and "not only disregards but supersedes the intention of the legislative body that designed the ordinance." Id. Moreover, it imposes a difficult evidentiary burden on those seeking to prove that a property owner has discontinued a nonconforming use and impedes the desirable goal of creating uniform zoning plans. Hartley, 764 P.2d at 1225.

The reason for ignoring the intent of the landowner when considering nonconforming uses is sound. "Public policy encourages the elimination of nonconforming uses primarily because they detract from the effectiveness of comprehensive land use regulation, often resulting in lower property values and blight." City of Glendale v. Aldabbagh, 939 P.2d 418, 421 (Ariz. 1997) (citations omitted).

"Consequently, nonconforming uses are *excepted* from the general rule that zoning ordinances should be strictly construed in favor of the property owner." Id.; *See also*, Hartley, 764 P.2d at 1224.

The federal court agrees. The 10th Circuit addressed this issue in C.F. Lytle v. Clark, holding that a Pitkin County zoning regulation requiring conformity with current zoning regulations if a nonconforming use is discontinued for a period of one year did not require a showing of intent to abandon. 491 F. 2d 834, 837 (1974).

The view that intent to abandon is irrelevant to a discontinuance ordinance is the growing minority view (*See, Hartley* and *Aldabbagh*, *supra*), though the criticized view that an intent inquiry is necessary in nonconforming use cases, and discontinuance provides only a rebuttable presumption of abandonment remains the shrinking majority view. Ansley House, Inc. v. City of Atlanta, 397 S.E.2d 419 (Ga. 1990).

In *Ansley House*, the court borrowed heavily from "Rathkopf's The Law of Zoning and Planning," which explains at common law, the landowner must "abandon" a use before it is lost, which required (1) proof of intent to abandon and (2) an overt act of abandoning. Id., (*citing*, A. Rathkopf and D. Rathkopf, Rathkopf's The Law of Zoning and Planning, vol. 4, §51.08, at 130 (1990)). The court reasoned that where an ordinance "sets forth a specific time period but contains nothing that negates the factor of intent to abandon," the expiration of the time period raises a rebuttable presumption of intent to abandon. Ansley House, Inc., 397 S.E.2d at 421. The controlling ordinance in *Ansley House* reads,

> "When a nonconforming use of a major structure or a major structure and premises in combination is discontinued for a continuous period of one (1) year, the structure and premises in combination, shall not thereafter be used except in conformity with the regulations of the district in which it is located. Such restriction shall not apply if such cessation is as a direct result of governmental action impeding access to the premises."

Id., 397 S.E.2d at 419.

Significantly, the West Valley City ordinance goes much further than the *Ansley House* ordinance and those like it. Whereas the *Ansley House* ordinance mentions a period of discontinuance and the allowable use thereafter, the West Valley City ordinance adds that disuse for the time period "shall constitute abandonment," effectively removing any relevance of intent to abandon.

The West Valley City ordinance is clear. Intent to abandon is irrelevant to the issue of whether a nonconforming use is lost. The Board erred in analyzing Cleone Kirby's intent and basing its permission to resume the nonconforming use on her intent.

B. Loss of the nonconforming use was not due to circumstances beyond Cleone Kirby's control.

Some courts that have adopted the objective test, consistent with a discontinuance ordinance, have nevertheless added a caveat that discontinuance "must be attributable at least in part to the property owner." City of Glendale v. Aldabbagh, 939 P.2d 418, 420 (Ariz. 1997). However, "termination of a nonconforming use does not require a decision by the property owner to discontinue the use. A nonconforming use may be lost through negligence or inadvertence." Id., 939 P.2d at 421.

The phrase, "circumstances beyond the property owner's control" is generally used to describe the situation where the property owner has no control at all over the

discontinuance of the nonconforming use. Smith v. Bd of Adjustment of City of Cedar Rapids, 460 N.W.2d 854 (Iowa 1990). Some of the circumstances courts have determined are completely beyond the control of the property owner are war and the consequent restriction imposed upon use by governmental authority, a general shortage of supplies necessary for the continued operation of the nonconforming use, a drop in demand, unlawful court order to discontinue, destruction by fire, flood, hurricane, inability to find a tenant. Ernst v. Johnson County, 522 N.W.2d 599 (Iowa 1994); Marchese v. Norristown Borough Zoning Bd. of Adjustment, 277 A.2d 176 (Pa. Cmwlth 1971).

The circumstances described by the courts prevented continuance of the nonconforming use despite efforts by the landowner to continue the use. The record in this case does not reflect any such circumstances. Three circumstances discussed by the board are worth reviewing. First, Cleone Kirby lives on limited Social Security income. Second, Edward Rogers removed his cedar fence. Third, Fred Kirby and Ronald Richins's brother removed their horses.

A limited income is not a circumstance considered beyond a landowner's control, such as a decrease in demand would be. Ernst v. Johnson County, 522 N.W. 2d 599 (Iowa 1994). Cleone Kirby alone, and not customers, suppliers, or anyone else caused her to be on Social Security. Additionally, the maintenance of a horse did not depend wholly on Cleone Kirby's income. At the time of the hearing, a horse resided on the Property, even though Mrs. Kirby was on Social Security. Accepting financial status as a circumstance beyond the control of the landowner would reopen the question of intent to

continue the use, which is precisely what the discontinuance statute attempts to avoid, as discussed above.

Edward Rogers's removal of his fence is a circumstance beyond Cleone Kirby's control, as is Fred Kirby's and Ronald Richins's brother's removal of their horses from the property. Nevertheless, these circumstances alone did not prevent Cleone Kirby from building a fence and placing horse on the property. Nobody physically prevented her from doing so. The government did not issue an order preventing the use. Nowhere in the record did anyone claim Mrs. Kirby was prevented from using her land as she wished. Cleone Kirby alone, as the landowner, had the responsibility to preserve the nonconforming use, as explained in Smith v. Bd. of Adjustment of City of Cedar Rapids, 460 N.W.2d 854.

In *Smith*, a landowner could not find a new lessee or buyer for his commercial structure, a nonconforming building in a residential zone. Id., 460 N.W.2d at 855. Ten months into the 12-month discontinuance period the zoning administrator sent Mr. Smith a letter revoking the nonconforming use. Id. The court recognizes the rule that nonconforming uses are not discontinued when the discontinuance is entirely beyond their control. Id., 460 N.W.2d at 857. When Mr. Smith complained he was prevented from using the property too early, the court held it was Mr. Smith who was "obliged to act with some dispatch" in challenging the zoning administrator. Id., 460 N.W.2d at 858. "Instead he did nothing for nearly 14 months." Id.

Likewise, Cleone Kirby should have acted with some dispatch when Edward Rogers removed his cedar fence and when Ronald Richins's brother removed his horses.

Instead she waited two years. As stated above, the loss of a nonconforming use "does not require a decision by the property owner to discontinue the use. A nonconforming use may be lost through negligence or inadvertence." City of Glendale v. Aldabbagh, 939 P.2d at 421. Regardless whether Cleone Kirby intended to discontinue the nonconforming use, she lost the use when through negligence or inadvertence she did not have a horse on her property for two years.

C. Circumstances beyond a landowners control should be irrelevant, absent a directive in the ordinance to consider such circumstances.

Instead of attempting to analyze what is or is not beyond a landowner's control, many objective-test jurisdictions ignore the question unless the ordinance specifically makes such an exception like the ordinance at issue in Jones v. Cusimano, 524 So.2d 172 (La.App.4Cir. 1988). That ordinance made an exception to discontinuance in instances where certain legal impediments prevented "possession, occupation, or control of the property." Id., 524 So.2d at 173, 174. No reservation exists in the West Valley City ordinance (though even if it did, nothing prevented Cleone Kirby from possessing, occupying, or controlling her property).

A Maryland court held a nonconforming use of operating a restaurant in a residential zone was lost when the discontinuance period ran, despite the facts that the owner diligently attempted to find a tenant to continue the operation, the restaurant remained as it was, ready to operate, and the operator had not demonstrated an intent to use the land for anything but a restaurant. Canada's Tavern, Inc. v. Town of Glen Echo, 271 A2d 664, 665 (Md. App. 1970).

In *Hartley*, the court held the nonconforming use of maintaining a wood and coal business was lost when lessees of the property discontinued the use, even though lessees had contracted with the owners to continue the wood and coal business. Hartley v. City of Colorado Springs, 764 P.2d 1216 (Colo. 1988). Similarly in this case, Cleone Kirby argued she discontinued the use of maintaining horses only because of the undesired acts of others.

The landowners in *Hartley* are not without recourse, however. They would still have an action against the lessees for any wrongful loss the lessees caused. Cleone Kirby would also have a cause of action against a person who wrongfully caused her to lose the nonconforming use.

The court in Badger v. Town of Ferrisburgh summed up the matter as follows:

> "Finally, we address property owner's policy argument that they should not lose nonconforming-use status based on involuntary inactivity beyond their control. As we stated above, the Legislature has adopted the policy of phasing out nonconforming uses, and the ordinance provision is consistent with that policy. To implement the phase-out policy, the Legislature and the Town can decide to establish a bright line that applies irrespective of the intent of the owner's ability to use the property."

712 A.2d 911, 915 (Vt. 1988). To demonstrate that a bright line test can have positive effects, the court added, "In general, a bright line aids subsequent purchasers . . . because they can easily ascertain whether they can use the property as a nonconforming use." Id.

This Court should adopt a rule consistent with the language of the ordinance and obvious intent of West Valley City to phase out nonconforming uses. If a nonconforming use is discontinued for more than twelve months, it has been abandoned, and any future

use must conform to current zoning provisions, regardless of intent to abandon and regardless of circumstances that may be beyond the landowner's control.

D. <u>The record lacks substantial evidence of Cleone Kirby's intent to continue the nonconforming use.</u>

Should this Court decide to consider Cleone Kirby's intent to abandon, the record does not contain substantial evidence to rebut the presumption that Cleone Kirby intended to abandon the nonconforming use. The following items make up all the evidence the Board used or could have used to support such a finding of intent.

1) Previous horses on the property were removed only because Edward Rogers removed his fence or because the owners of the horse could not maintain Mr. Rogers's fence. (R. 60).

2) The lack of a fence bordering Edward Rogers's property (the apartment complex) was "one of the reasons why [the horse owners] couldn't put the horses back" on the property. (R. 65).

3) No improvements were made to the land during the two-year absence of horses. (R. 83 —Mr. Spendlove).

4) Cleone Kirby visited somebody named Mr. Hooper during the two-year period to ask him whether Edward Rogers could be forced to replace his fence. (R. 78).

5) After two years without a horse on Mrs. Kirby's property, the Sprays moved to West Valley City from Oklahoma and, with the help of Ronald Richins, built a fence to separate the apartment property from Cleone Kirby's property, and placed their horse on Mrs. Kirby's property.

6) Cleone Kirby likes the horse that is currently on her property and would like the horse to stay. (R. 60).

The policy behind zoning laws "is the gradual elimination of non-conforming uses and, accordingly, ordinances should not be given an interpretation which would permit an indefinite continuation of the non-conforming use." State Ex Rel. Peterson v. Burt, 166 N.W.2d 207, 210 (Wis. 1969), *citing*, McQuillin on Municipal Corporations, 3rd Edition, Vol 8, section 25.189 (see current volume 8A, (2005)). To interpret the West Valley City ordinance to permit a nonconforming use wherever a landowner resumes the use (item 5 above) or expresses a desire to do so (item 6 above) would permit an indefinite continuation of all nonconforming uses. For such evidence to prove intent, if indeed intent is relevant would defeat render the discontinuance portion of the ordinance meaningless.

Likewise, availability of land to be used in the nonconforming way (item 3 above) cannot support a finding of intent to continue the use. In an Alaska case, owners of an airstrip failed to personally use their property as an airstrip, though it remained useable as an airstrip as demonstrated by two trespassers who occasionally used the property as an airstrip. Cizek v. Concerned Citizens of Eagle River Valley, Inc., 49 P.3d 228 (Alaska 2002). The Alaska Supreme Court ruled actual use was necessary to maintain a nonconforming use. Id. Otherwise, "local governments could almost never terminate a nonconformity because it would legally continue as long as the land's physical suitability for actual nonconforming use remained." Id., 49 P.3d at 231.

Cleone Kirby's discussion with Mr. Hooper (item 4 above) is the weakest of all the possible evidence of intent. The discussion could demonstrate some intent to have a fence restored, but does not directly confirm an intention to have horses (especially considering Cleone Kirby does not own a horse). Neither does it demonstrate an "overt act" toward continuing the use since nothing was done beyond the discussion. Some examples of overt acts that demonstrate intent include obtaining a building permit, beginning renovations, applying for a business license, and obtaining a temporary certificate of occupancy. Ansley House, Inc., *supra.* Furthermore, no evidence was given concerning the timing of the discussion and whether it occurred during the first 12 months of discontinuance or after, which is important (as discussed above).

Finally, that Edward Rogers removed his fence and Ronald Richins's brother removed his horses have no bearing on Cleone Kirby's intention to maintain horses on her property. At best it could show Ronald Richins's brother's[4] intent to maintain horses on the Kirby Property.

No evidence was given that Cleone Kirby owns a horse or owned a horse during the relevant past five years. Though nothing requires the landowner to maintain the nonconforming use, the landowner's intent, and not the horse owner's intent, is the critical intent to be proven (again, if intent is even relevant). To suggest otherwise would be nonsensical. For example, in *Cizek*, two pilots demonstrated their intent to use the

[4] Ronald Richins's brother did not speak at the meeting or send a statement to the board. All information about him and his horses came from Ronald Richins.

Cizeks' land as an airstrip by landing planes on it. Cizek, 49 P.3d 228. The court did not even consider the intent of the other pilots in its analysis. Id.

Because Mrs. Kirby did not own a horse, one cannot make the assumption she intended to have a horse on her property. What one can assume by the evidence is she allowed people to place their horses on her property. By Mrs. Kirby's own admission she was not being paid to allow the horses on the property, since she was living on social security alone. (R. 78). Therefore she could not show an intent to board horses.

All the evidence, when considered together, shows Cleone Kirby allowed horses on her property and even enjoyed the horses. But no evidence shows she had a plan to continue having horses on her property or that she did anything to keep the horses on her property. When the cedar fence was taken down neither she nor anyone else built a new fence until two years later, after the Sprays unexpectedly moved from Oklahoma with a horse. When the city condemned the horse shelter (before the fence was removed), she took it down and did not rebuild. (R. 67).

Although intent of the horse owners is irrelevant, the evidence shows a lack of intent by Fred Kirby and Ronald Richins's brother to maintain horses on Cleone Kirby's property. Fred Kirby testified he removed his horses in 2000, while the cedar fence was still standing, because he could not maintain the cedar fence. (R. 62). The removal of the fence in 2002 could not possibly relate to his intention to maintain horses there.

No evidence was given of improvements to the cedar fence between the time Fred Kirby removed his horses and Ronald Richins's brother moved his horses onto the Property, which means the fence was still in a state of disrepair and unable to contain

horses. As the board members noted, owners of animals bear the responsibility to care for the animals and had the responsibility to build a fence. (R. 84, 85, 87). That Ronald Richins's brother removed his horses when the cedar fence was removed, rather than build a new fence, demonstrates his intent not to care for and maintain the animals on the Kirby Property.

Of course, as explained above, this entire inquiry into intent to abandon or intent not to abandon is precisely what the nonconforming use ordinance meant to eliminate. Even considering intent, though, Cleone Kirby did not present evidence to rebut a presumption of intent to abandon. The nonconforming use of maintaining horses was lost, and future use must conform to current zoning standards.

CONCLUSION

To conclude, because Cleone Kirby discontinued the nonconforming use for two years, the nonconforming use was lost, regardless of her intent to continue the use, actions by others, or her financial status. Nonetheless the record lacks substantial evidence of intent to continue the nonconforming use or circumstances wholly beyond Cleone Kirby's control. This Court should reverse the Board's decision and trial court's order, and require the West Valley City Board of Adjustment to issue a denial of the application for nonconforming use status.

Dated this 10th day of November, 2005

Attorney for Edward B Rogers

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing **Brief of Appellant** was mailed first-class, postage prepaid to the attorney for Defendant/Appellee:

Nicole Cottle
3600 Constitution Blvd.
West Valley City, UT 84119

this 10th day of November, 2005.

ADDENDUM

IN THE UTAH COURT OF APPEALS

CHARLES CASTER, dba BACK YARD AUTO,	:	
Plaintiff/Appellant,	:	Case No. 2000619SC
v.	:	Priority No. 13
WEST VALLEY CITY, a Utah Municipal Corporation,	:	
Defendant/Appellee.	:	

BRIEF OF THE APPELLEE

Appeal from the Third Judicial District Court,
in and for Salt Lake County, State of Utah;
the Honorable David S. Young

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record demonstrates that they did not. If a property owner exercising a nonconforming use cannot lose that status by failing to obtain a business license, neither should they be able to maintain their nonconforming use status by obtaining a business license when all business activity has been discontinued.

III. DISCONTINUANCE IS THE APPROPRIATE METHOD FOR DETERMINING LOSS OF NONCONFORMING USE STATUS

Utah state statute requires continuous use of a nonconforming use to maintain nonconforming use status. By defining a nonconforming use as a use of land that "has been maintained continuously since the time the zoning regulation governing the land changed," it is clear that a nonconforming use that has not been continuously maintained must comply with current zoning regulations. UTAH CODE ANN. § 10-9-103(1)(ii) (2000). Caster's failure to continuously maintain the nonconforming use, or in other words, the discontinuance of the nonconforming use for a continuous period resulted in a loss of nonconforming use status.

In addition to the State statute discussed above, Utah case law demonstrates the validity of discontinuance

provisions. Discontinuance ordinances have been validated by the Supreme Court of Utah in two cases.

In, State of Utah v. Estate of Holt, the Supreme Court of Utah found that:

> "the burden of proving the right of a non-conforming use of property under an ordinance . . . was on the property owner and evidence which showed a discontinuance of the non-conforming use for a period of five years after the one-year period provided in the ordinance proved an effective abandonment of such right and the property was thereafter subject to the zoning requirement."

381 P.2d 724, 725 (Utah 1963).

The ordinance in Holt and the West Valley City Ordinance both requiring compliance with current zoning requirements if a nonconforming use is discontinued for a continuous period of one year. Id; West Valley City Municipal Code § 7-18-106(3). In accordance with the Holt decision, it follows that evidence which demonstrates a discontinuance of a nonconforming use for the stated period results in a loss of nonconforming use status. The Board in this case found such evidence of discontinuance and, therefore, found that Back Yard Auto's nonconforming use status had lapsed.

In an earlier case, the Supreme Court of Utah found that a protracted period of unexplained vacancy and no showing of

a nonconforming use for continuous years demonstrates discontinuance. The Court, interpreting the Salt Lake County Ordinance in question, required conformance with zoning requirements. Morrison v. Horne, 363 P.2d 1113, 1114 (Utah 1961). Again, the Salt Lake County Ordinance involved in Morrison is nearly identical to the West Valley City discontinuance ordinance. Id at FN1. Recognition of discontinuance provisions by the Supreme Court of Utah demonstrates the policy that nonconforming uses are inapposite to local government zoning. "Public policy and the spirit of zoning measures are to restrict and not to increase nonconforming uses." 8A Julie Rozwadowski and James Solheim, The Law of Municipal Corporations, (1994).

The law in Utah is clear. State statute, Morrison, and Holt demonstrate that discontinuance ordinances are common and valid in Utah and where evidence exists confirming discontinuance for the required time period, property owners are required to comply with current zoning standards.

In Utah and other states, courts have held that the running of a discontinuance period results in the loss of nonconforming use status. State of Utah v. Estate of Holt, 381 p.2d 724 (1963); Morrison v. Horne, 363 p.2d 1113 (1961);

Hartley v. City of Colorado Springs, 764 P.2d 1216, 1219 (1988) (holding that proof of intent to abandon is not required when a zoning ordinance specifies a time for termination based on discontinuance); City of Glendale v. Aldabbagh, 939 P.2d 418 (1997) (holding that where nonuse is attributable to property owner, (not involuntary), nonconforming use status could be lost without a showing of intent); Toys "R" US v. Silva, 676 N.E.2d 862 (1996); see also 8a Julie Rozwadowski, James Solheim, The Law of Municipal Corporations, § 25.194, 1994; 4A Norman Williams Jr., John M. Taylor, American Land Planning Law § 115.14 (1986). In addition, the 10th Circuit addressed this issue in C.F. Lytle v. Clark, holding that a Pitkin County zoning regulation requiring conformity with current zoning regulations if a nonconforming use is discontinued for a period of one year did not require a showing of intent to abandon. 491 F. 2d 834, 837 (1974).

However, loss of nonconforming use status is determined differently in other states. Essentially there are three distinct rules regarding loss of nonconforming use status. In some states, a nonconforming use can only be lost through a showing of intent to abandon and an overt act demonstrating

that intent. 8A Eugene McQuillan,Julie Rozwadowski, and James Solheim, The Law of Municipal Corporations,§ 25.192, (1994); 4A Norman Williams Jr., John M. Taylor, American Land Planning Law § 115.07 (1986); Michael E. Labonati, and John Martinez, Local Government Law, § 16.16 (2000). This rule, which Caster now urges this Court to adopt, has been criticized by courts and commentators.

> [T]he rule produces results that are not only 'unfortunate but silly' because it encourages property owners who have actually abandoned their nonconforming use to commit perjury, and because it not only disregards but supersedes the intention of the legislative body that designed the ordinance.

Hartley v. City of Colorado Springs, 764 P.2d 1216 (1988) citing 4A Norman Williams Jr., John M. Taylor, American Land Planning Law § 115.06 (1986).

In other states, discontinuance creates a rebuttable presumption of abandonment of nonconforming uses. In these states, the municipality has adopted an ordinance with an automatic termination period based on discontinuance but the court adds an intent requirement. Ansley House Inc. v. City of Atlanta, 397 SE2d 419 (1990); County of Isanti v. Peterson, 469 NW2d 467 (1991) see also 8a Julie Rozwadowski and James Solheim, The Law of Municipal Corporations,§ 25.194, 1994.

Although, numerically, the intent to abandon test represents the majority test, this test and the case law that discusses was based on the needs of a nation facing the great depression. See 4A Norman Williams Jr., John M. Taylor, American Land Planning Law § 115.06 (1986). An increasing number of states are shifting from the common law subjective test and moving to an objective discontinuance test like the test that currently exists in Utah. Id. at § 115.14. This shift makes sense when considering the fact that the underlying theory of nonconforming uses is that compliance with the current zoning is imminent. The objective Utah test is also a better test because it facilitates the public policy requiring that nonconforming uses comply with current zoning ordinances as soon as is fair and appropriate. Id. at § 112.07. To change the current nonconforming use law would run afoul of the trends, it would run against public policy and it would perpetuate the existence of nonconforming uses in derogation of municipal zoning.

CONCLUSION

City ordinance, in accordance with state law requires conformance with current zoning when a nonconforming use is discontinued. UTAH CODE ANN. § 10-9-103(1); WEST VALLEY CITY

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